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In the Supreme Court of the United States

October Term, 1973
No. 73-294

DONALD ZIMMERMAN,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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In the Supreme Court of the United States

October Term, 1973

No. _____

DONALD ZIMMERMAN,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Donald Zimmerman, prays that a Writ of Certiorari issue to review the judgment entered in this case by the Supreme Court of the State of Ohio affirming his conviction for murder in the first degree.

OPINIONS BELOW

The only written opinion below is that of the Court of Appeals for the Ninth Judicial District, Ohio (Appendix page 29).

The appeal to the Supreme Court of Ohio was dismissed without opinion (Appendix page 35).

JURISDICTION

This is a review of a judgment of the Supreme Court of Ohio, journalized May 25, 1973, denying petitioner's motion for leave to appeal and dismissing his appeal as of right *sua sponte*.

Jurisdiction is conferred by virtue of Title 28, Section 1257 (3) U.S.C. (62 Stat. 929, c. 646, § 1, June 25, 1948).

QUESTIONS PRESENTED FOR REVIEW

I. Is it a violation of the Fifth Amendment privilege against self-incrimination to admit into evidence a confession elicited without his knowledge from a murder suspect, who is lying semi-conscious in intense pain in an emergency room of a hospital preparatory to surgery, by a nurse's aid who asked questions written out by a police officer?

Subsidiary Question

Did the trial court violate the rule in *Jackson v. Denno*, 378 U.S. 368 (1964), in failing to conduct an evidentiary hearing by a body other than the one trying petitioner's guilt or innocence in order to determine whether the confession was voluntary?

II. Is it a violation of the Fifth Amendment privilege against self-incrimination to order a defendant who enters inconsistent, but legally permissible, pleas of "not guilty" and "not guilty by reason of insanity" to submit to a pre-trial psychiatric examination to determine his mental competency, i.e. sanity, at the time of and during the commission of the alleged crime?

Subsidiary questions presented

1. Assuming the Fifth Amendment privilege against self-incrimination is not violated, should any such order preclude the use of the fruits of such examination, or any incriminating statements elicited during the examination, in the State's case in chief to prove the substantive elements of the crime? Should such fruits and statements be limited to use only in rebuttal?

2. Does such an examination, assuming the accused's lawyer is not present, violate the Sixth Amendment right to counsel?

3. In those states which require the accused to prove insanity, should there be a bifurcated, two-part trial, one on the issue of whether the defendant committed the act, and the second trial on the issue of his mental competency at the time he has been proved to have committed the act?

4. Where an accused, on the advice of counsel on Fifth Amendment grounds, refuses to submit to a pretrial psychiatric examination, may his refusal to cooperate be admitted into evidence or be the subject of comment by the prosecuting attorney in his final argument?

III. Is it a violation of Due Process to place upon the defendant the burden of proving the defense of insanity by a preponderance of the evidence when evidence of insanity has been introduced by the defendant and a doubt as to sanity created? Should not the rule, under Due Process, be that when intent is required as an element of a crime, the State must prove beyond a reasonable doubt the mental competency of the defendant to commit the crime for which he is charged?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 5, Constitution of the United States:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

Amendment 6, Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Amendment 14, Constitution of the United States:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10, Constitution of Ohio:

". . . No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. (As amended September 3, 1912)"

Section 2945.40, Ohio Revised Code:

Expert witnesses in insanity cases. (GC § 13441-4)

"In any case in which insanity is set up as a defense, or in which present insanity of the accused is under in-

vestigation by a court or jury, the court may commit the defendant to a local hospital for the mentally ill, or the Lima state hospital, where the defendant shall remain under observation for such time as the court directs not exceeding one month. The court may in such case appoint one or more, but not more than three, disinterested qualified physicians, specialists in mental diseases, to investigate and examine into the mental condition of the defendant and testify as experts at his trial or other hearing. In case of such appointment the court shall forthwith notify counsel of the names and addresses of the persons so appointed. The expert witnesses appointed by the court may be called by the court and shall be subject to examination and cross-examination by the prosecuting attorney and counsel for the defendant. The appointment of such expert witnesses, and their testifying as witnesses, shall not preclude the prosecuting attorney or defendant from calling other witnesses to testify on the subject of insanity. Such persons so appointed may be required by the court to prepare a written statement under oath, concerning the mental condition of the defendant, and file the same in the case. Such report shall not be read as evidence, except that it may be used by either counsel on the cross-examination of the witness who signed the same. The court shall instruct the jury in case of such appointment and testimony of such expert witnesses, that the credibility of such witnesses, in common with all other witnesses in the case, is for the exclusive consideration and determination of the jury. Persons so appointed shall be paid a reasonable fee for their examination or service and their reasonable expenses, the amount whereof shall be certified by the judge or court making the appointment and paid by the county."

STATEMENT OF THE CASE

Petitioner in the early morning of January 6, 1972, during what his treating psychiatrist termed as an acute psychotic state and while responding to an insane delusion, stabbed his wife six times while she was asleep and attempted to commit suicide by stabbing himself two times in the abdomen.

The only direct, testimonial evidence implicating petitioner in the killing was a confession, introduced over his objection on constitutional grounds, which had been elicited by a police officer through a nurse's aid while petitioner lay semi-conscious in intense pain under the influence of intravenous injections in the emergency room at Saint Thomas Hospital in Akron, which could be heard only by means of a stethoscope.

During an earlier investigation of the crime at the home, petitioner had admitted to another officer that he had killed his wife and attempted to kill himself; this evidence, however, was ruled inadmissible at an earlier stage of the trial, leaving only the confession elicited at the hospital as evidence of petitioner's complicity.

Prior to trial at the request of the prosecuting attorney, the trial judge, over petitioner's objections on Fifth and Fourteenth Amendment grounds (Transcript), ordered petitioner to undergo pre-trial psychiatric examinations for the purpose of determining his ability to stand trial and his mental state at the time he was alleged to have killed his wife and attempted to kill himself. On

the advice of his counsel, for the reason that there was no direct testimonial evidence that petitioner had killed his wife, petitioner refused to submit himself to the psychiatric examination as to his mental condition on the night he killed his wife.

These court appointed psychiatrists testified that petitioner had refused to cooperate with them on the advice of his counsel during their attempted psychiatric examinations of him and were for that reason unable to express any opinion, one way or the other, as to petitioner's mental state at the time he was alleged to have killed his wife and attempted to kill himself.

During final argument, the prosecuting attorney made great capital of petitioner's refusal to "cooperate" with the state's psychiatrists, saying (B.E. 767-768):

> "And I decided if truly I were convinced at the end of this trial that he was insane at the time he stabbed his wife to death last January 6th and the psychiatric testimony was convincing to a preponderance, then I would be satisfied and Mr. Badger would be satisfied that the Prosecution did everything they could. So, to insure that, we attempted to get other psychiatrists involved in the only way we could.
>
> Now, I am going to mention this fact again, but I'd like to mention it right now. The only limitation, the only reason why I couldn't bring four doctors in here to give positive opinions as to whether he was sane or insane, the only reason is because that man would not talk to those doctors. Now, Mr. Scanlon—"
>
> Mr. Scanlon: I object."

An investigation of the death of petitioner's wife and the attempted killing of petitioner was made by the Akron

Police Department upon their arrival at the Zimmerman home. Petitioner was questioned about the circumstances of his wife's death and the knife which protruded from his stomach and admitted to the police that he had stabbed his wife and attempted to kill himself. These statements were not, however, permitted into evidence following the holding of the Court in *Escobedo v. Illinois* and *Miranda v. Arizona*. Petitioner was then taken to a hospital where intravenous injections were administered in order to stimulate him and in preparation for surgery.

While petitioner was being prepared for surgery, Detective Jospeh Wolfe of the Akron Police Department, after having been ordered to the hospital by his superior, Lieutenant Rusyn, had left the Zimmerman home and arrived at the emergency room. Wolfe attempted to question petitioner about what had happened, but he was not yet responding. Wolfe then left the emergency room; later, after he had learned from nurse's aide Dorothy Kidd that the injections were stimulating petitioner and he was now responding to his name, Wolfe came back into the emergency room (B.E. 177, 214-215). Petitioner would not respond to Wolfe but would respond to Mrs. Kidd, who could hear him through her stethoscope. Wolfe then wrote out questions on a pad for Mrs. Kidd to ask Zimmerman.

Mrs. Kidd testified that she asked petitioner, "What happened?" to which he responded:

"Q. What was that question you asked him?
A. I asked him where was his wife.
Q. All right. What did he say?
A. He said his wife was dead.
Q. All right.
A. And I asked him how did he know his wife was dead, and he said 'Because I killed her.' "

These statements were offered over petitioner's objection, made in the form of a pre-trial motion to suppress as evidence the testimony of Officer Wolfe and nurse's aide Dorothy Kidd which was heard by the three judge court during the trial. This statement of petitioner given to Officer Wolfe in the emergency room of Saint Thomas Hospital was the only direct testimony connecting petitioner with his wife's death. All other evidence was circumstantial, from inferences and assumptions that petitioner must have killed his wife and attempted to kill himself by reason of the fact that he, his wife and children were the only ones in the Zimmerman home at the time of his wife's death, and the attempt on his own life.

At the conclusion of the state's case petitioner moved for a directed verdict in his favor on the issue of murder in the first degree, there being, without this involuntary statement to Officer Wolfe, no evidence of premeditation or malice. This motion was overruled, and petitioner then offered the testimony of three psychiatrists to the effect that he was suffering from a psychotic delusion at the time he killed his wife and attempted to kill himself.

The court appointed psychiatrists then testified, based upon their inability to examine petitioner on the advice of his counsel, that they had no opinion as to his mental condition at the time he killed his wife and whether he was or was not sane. Notwithstanding the unanimous medical opinion of all the psychiatrists who testified and who had an opinion that petitioner was insane when he killed his wife, a verdict finding petitioner guilty of murder in the first degree was returned.

At the conclusion of all of the testimony, counsel for petitioner expressed their belief that when any credible evidence of insanity is introduced by the defense to rebut the presumption of insanity, the state then had the burden

to prove the sanity of the defendant beyond a reasonable doubt (B.E. 732-733). This requested instruction was overruled, the court holding that the defendant had the burden of proving his insanity by a preponderance of the evidence in accordance with the rule as announced by the Ohio Supreme Court in *State v. Staten*, 18 Ohio St. 2d 13 (1969).

In all of the appeals and before the trial court, petitioner assigned as errors the inadmissibility of the involuntary statement given to Officer Wolfe and nurse's aide Kidd at the hospital, the violation of petitioner's constitutional privilege against self-incrimination by ordering him to submit to a pre-trial state conducted psychiatric examination as to his sanity on January 6, 1972 and that the Ohio rule requiring him to prove his insanity by a preponderance of the evidence violated the Fourteenth Amendment requiring the State to prove him guilty beyond a reasonable doubt before he could be found guilty.

None of these errors were considered by the Ohio appellate courts to be violations of either the Fifth or Sixth Amendments as incorporated into the Fourteenth Amendment. The Court of Appeals held that the interrogation in the hospital was investigatory and not accusatory, even though at that time the Akron Police Department was aware, having been earlier told by petitioner while lying on the floor at his home, that he had killed his wife. The Court of Appeals stated, "All of the questions asked by Detective Wolfe of the appellant concerned an effort to find out what had happened. The officer asked no questions about appellant's wife." As to petitioner's claim that the pre-trial psychiatric examination violated his Fifth Amendment privilege against self-incrimination, the Court of Appeals held that, although petitioner's counsel had objected to the pre-trial psychiatric examination and had instructed their client not to cooperate with the psychiatrists or to offer to them any evidence which could

incriminate him, they had "waived" such objection because they had not objected when the psychiatrists were called by the State to testify in rebuttal at the trial.

REASONS FOR GRANTING THE WRIT

I. Is it a violation of the Fifth Amendment privilege against self-incrimination to admit into evidence a confession elicited without his knowledge from a murder suspect, who is lying semi-conscious in intense pain in an emergency room of a hospital preparatory to surgery, by a nurse's aide who asked questions written out by a police officer?

It has been the consistent policy of the Court in a long line of cases beginning in 1936 with *Brown v. Mississippi*, 297 U.S. 278, 80 L. Ed. 682, 56 S. Ct. 461 (1936), to review the actions of the states in their use of involuntary confessions in order to assure that persons accused of a crime are not deprived of their liberty without Due Process of Law.

In the case presented here, petitioner was deprived of his liberty without Due Process of Law when an involuntary oral confession was taken from him without his knowledge by nurse's aide Dorothy Kidd from questions written by Officer Joseph Wolfe of the Akron Police Department and presented to Mrs. Kidd, while petitioner was lying semi-conscious in intense pain in the emergency room of Saint Thomas Hospital preparatory to surgery after having been administered intravenous injections. At the time petitioner was so weak his answers could only be heard by means of a stethoscope. Officer Wolfe had been dispatched to the hospital under orders of Lieutenant Rusyn of the Akron Police Department for the sole purpose of obtaining a statement from petitioner.

Not only were the statements involuntary, they were elicited from petitioner in the absence of any legal counsel, he being clearly entitled to counsel under the rulings of this court in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), and *Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964), but they were also taken without first warning him of his constitutional right to remain silent.

Even if nurse's aide Kidd had informed petitioner of his constitutional right to remain silent, it is extremely doubtful that petitioner, considering the fact that he was in extreme pain suffering from a lacerated liver and omentum, would have understood such a warning, or been able to respond to it. Under these circumstances, petitioner's confession could not be termed "voluntary".

Involuntary confessions are struck down, not as much for the reason that they are not trustworthy, but that they offend our sense of fundamental fairness and are themselves obtained in violation of law. The late Justice Frankfurter at 365 U.S. 540, speaking for the court, said in *Rogers v. Richmond*, 365 U.S. 534, 5 L. Ed. 2d 760, 81 S. Ct. 735 (1961):

> "Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true, but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by co-

ercion prove its charge against an accused out of his own mouth. See *Chambers v. Florida,* 309 U.S. 227, 84 L. Ed. 716, 60 S. Ct. 472; *Lisenba v. California,* 314 U.S. 219, 236, 86 L. Ed. 166, 179, 62 S. Ct. 280; *Rochin v. California,* 342 U.S. 165, 172-174, 96 L. Ed. 183, 190, 191, 72 S. Ct. 205, 25 ALR2d 1396; *Spano v. New York,* 360 U.S. 315, 320, 321, 3 L. Ed. 2d 1265, 1269, 1270, 79 S. Ct. 1202; *Blackburn v. Alabama,* 361 U.S. 199, 206, 207, 4 L. Ed. 2d 242, 247, 248, 80 S. Ct. 274. And see *Watts v. Indiana,* 338 U.S. 49, 54, 55, 93 L. ed 1801, 1806, 69 S. Ct. 1347, 1357. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees."

This principle was reexpressed in *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964) and *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). In *Miranda v. Arizona, supra,* Chief Justice Warren, speaking for the court, said at 384 U.S. 444:

> "* * * the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way.* As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. * * *" (Emphasis added)

Whether voluntary or involuntary, it was obtained by trickery and deception. Petitioner, who at the time was certainly very close to death and would have died without surgery, believed he was talking to a nurse who would protect and care for him; in truth, he was talking to a police officer who intended to use his statements against him at his subsequent trial. As in the case of *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964), petitioner did not know he was being interrogated. The basic rule against self-incrimination must apply to indirect and surreptitious interrogation as well as those conducted in the jail house.

Other cases, under similar circumstances, have held that results of interrogation in a hospital or while under

the influence of drugs are not voluntary. See *Townsend v. Sain*, 372 U.S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963); the two *Beecher* cases; *Beecher v. Alabama*, 389 U.S. 35, 19 L. Ed. 2d 35, 88 S. Ct. 189 (1967) and *Beecher v. Alabama*, 408 U.S. 234, 33 L. Ed. 2d 317, 92 S. Ct. ..... (1972); and the quite similar case, *Pea v. United States*, 116 App. D.C. 410, 324 F.2d 442 (1963), vacated 378 U.S. 571, 12 L. Ed. 2d 1040, 84 S. Ct. 1929 (1964), which was retried and again reported in 397 F.2d 627 (1967), held that a confession obtained from an accused while he was under arrest and lying wounded in the hospital was inadmissible.

The opinion in the latest report of the *Pea* case is particularly apposite to the instant case. Pea shot his wife and thereafter shot himself. He was taken directly to the emergency room of a hospital with a bullet lodged in his head and was coherent but lethargic and indifferent to protecting himself. While in the hospital, he was questioned by detectives to whom he admitted he had shot his wife. The Court of Appeals for the District of Columbia held that Pea's free will had been negatived by the concussion of the bullet shattering his head, leaving him the appearance of coherence but devoid of his normal will to protect himself and indifferent to protect himself. Under these circumstances, the court held the admissions at the hospital were inadmissible for the reason that they were not voluntary. The court further held that the prosecution had the burden of proving beyond a reasonable doubt the voluntariness of the confession; the burden was not upon the defendant to prove the confession involuntary, overruling a previous holding of that court.

Jackson v. Denno, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774, 1 A.L.R.2d 1205 (1964), in which Jackson was hospitalized and confessed after he had been given

doses of demerol and scopolamine and while wounded and in extreme pain, is also applicable.

The issue is also presented as to whether Zimmerman, while lying in the hospital, was then sane, which could not come out in the evidence until the defendant had presented his case. The United States Supreme Court in *Blackburn v. Alabama,* 361 U.S. 199 at 207, 80 S. Ct. 274 at 280, 4 L. Ed. 2d 242 (1960) said:

> "In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion."

The latter decision of *Beecher v. Alabama, supra,* is particularly apposite. There, petitioner gave a coerced confession after being intimidated by a police chief; later, while in the hospital preparatory to surgery after receiving morphine injections, feverish and in intense pain, he again confessed. The Court held such a confession to be "the product of gross coercion and hence plainly involuntary".

The admission of petitioner's involuntary confession into evidence was extremely prejudicial to his defense. Without this evidence the only facts implicating him in the tragic events of the night of January 6, 1972 was the

fact that petitioner, his wife and three children were apparently alone in the house, there being no evidence of unauthorized or forcible entry. These circumstances alone do not raise an inference of first degree murder.

In addition, this substantial question is presented: whether, under the rule of *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774, 1 A.L.R.3d 1205 (1964), where a jury is waived and the case is tried by a three judge court, the evidentiary hearing to determine the voluntariness of the confession may be heard by the same three judges who are to make the determination of the guilt or innocence of the defendant. Petitioner well in advance of the trial date filed a motion to suppress evidence. The judge who was assigned to try the case, although often requested prior to trial, did not rule upon petitioner's motion to suppress until petitioner had waived a jury trial, three judges had been empaneled and the state had begun its case. While Officer Wolfe testified, the presiding judge interrupted his testimony to say (B.E. 178):

> "I think what we ought to do at this point is begin the hearing on the motion to suppress."

Nurse's aide Dorothy Kidd's testimony was similarly treated. The consequence of this procedure was that the evidentiary hearing on the motion to suppress was heard simultaneously with and considered to be identical with the testimony considered at the trial and heard by the triers of the fact.

Although in *Jackson v. Denno, supra,* the defendant was tried by a jury, we can see no rational distinction between a jury trial and a trial by a three judge court. If a jury would have difficulty disregarding the substance of an involuntary confession, would not three judges, sitting as the triers of the fact, have similar difficulty?

II. It is a violation of the Fifth Amendment privilege against self-incrimination to order a defendant who enters inconsistent, but legally permissible, pleas of "not guilty" and "not guilty by reason of insanity" to submit to a pre-trial psychiatric examination to determine his mental competency, i.e. sanity, at the time of and during the commission of the alleged crime?

The question presented here for consideration has not heretofore been decided by the Court.

Ohio law provides "in any case in which insanity is set up as a defense, or in which present sanity of the accused is under investigation" for a pre-trial psychiatric examination by "not more than three, disinterested qualified physicians, specialists in mental disease, to investigate and examine into the mental condition of the defendant and testify as experts at his trial or other hearing." Section 2945.40, Ohio Revised Code.

In the case at bar, the trial court appointed three psychiatrists to examine into petitioner's sanity to stand trial and three additional psychiatrists to examine into his mental condition at the time he was alleged to have killed his wife. Although petitioner argued that Section 2945.40, Ohio Revised Code, authorized the appointment of, at most, three psychiatrists, both the trial court and the Court of Appeals held that the statute should be read to authorize the appointment of three psychiatrists to determine sanity to stand trial and three additional psychiatrists to determine sanity at the time of the commission of the offense.

Although not objecting to the appointment of three psychiatrists to determine his competency to stand trial, petitioner vigorously objected to the appointment of three additional psychiatrists to examine into his mental condition at the time of the commission of the offense, relying

upon the Fifth Amendment privilege against self-incrimination and citing 32 A.L.R.2d 434 and Ohio cases which had previously held that the statute should be construed only to permit examination into present sanity. *In Re Henry*, 97 Ohio App. 64 (1954) and *State v. Henley*, 15 Ohio St. 2d 86 (1968).

At this juncture of the case—before trial and when a motion to suppress evidence had been filed, but not yet heard—petitioner was placed in this dilemma: If he refused to cooperate with his psychiatrists by not testifying, he could jeopardize his insanity defense. On the other hand, if he cooperated fully and permitted the psychiatrists to fully probe his mind, he would admit revealing incriminating actions which could be used against him at his trial. Petitioner, on the advice of his counsel, refused to cooperate.

We have found few cases, and none by this Court, which have considered the Fifth Amendment questions presented by pre-trial psychiatric examinations. In *State v. Myers*, 220 S.C. 309, 67 S.E.2d 506, 32 A.L.R.2d 430 (1951), the South Carolina court suggested that, while the examination did not conflict with the privilege against self-incrimination, the Court psychiatrists would not be permitted over the objections of the accused, to reveal any confessions made by him in the course of their examination implicating the accused in the crime charged. The Court of Common Pleas of Summit County, Ohio, in its order to examine petitioner, included no statement protecting petitioner against self-incrimination.

We do not believe that the Court, as has been argued by some authors, in *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966), disposed of the legal principles involved in the instant case in its holding that blood samples could be extracted from an accused. Blood samples are vastly different from words of incrimination.

In the instant case, the Court of Appeals mistakenly stated that petitioner had "waived" the objections to the appointment of the psychiatrists to examine into his mental condition at the time he killed his wife when he failed to object as each of them was called by the State to testify in rebuttal at the actual trial (obviously, any psychiatrist, whether he has examined the patient or not, may be called upon to testify as to his opinion in answer to hypothetical or other questions). As the record abundantly discloses, petitioner objected to the appointment of the psychiatrists, stating that he was refusing on advice of counsel. What was constitutionally objectionable was that, after ordering petitioner to be examined over objection, the psychiatrists were then permitted to testify that petitioner had refused to cooperate with him, and for the prosecutor in his closing argument to suggest that petitioner's reasons for not cooperating was because he had something to hide. In fact, it was the absence of evidence to implicate petitioner in the murder of his wife which, in protecting his constitutional rights, compelled his counsel to request him to remain silent so that he would not waive his privilege against self-incrimination. The State thus argues: If petitioner had cooperated, he would have waived his privilege against self-incrimination; by not cooperating he has made it impossible for the State to rebut his defense of insanity and refused to cooperate because he was not insane at all. The State is actually invoking the doctrines of waiver and mutuality. By pleading "not guilty by reason of insanity" petitioner, the State argues, waives his privilege against self-incrimination to all testimony based upon the court ordered examination. See *State v. Myers, supra*; *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965); *Pope v. U. S.*, 372 F.2d 710 (8th Cir. 1967); *Rogers v. State*, 222 Miss. 690, 76 So. 2d 831 (1955); *State v. Petty*, 32 Nev. 384, 108 P. 934 (1910); *State v. Cerar*, 60 Utah 208, 207 P. 597 (1922).

What is the proper solution to this dilemma, so as to preserve the State's rights to rebut a defendant's insanity defense and at the same time protect his constitutional rights? As has been suggested by some courts and authors, the order for an accused's pre-trial psychiatric examination can specifically state that any statements against interest could not be used by the State to prove the substantive elements of the crime, restricting its use to rebuttal only.

The Model Penal Code, Section 4.09 (Proposed Official Draft 1962) so suggests:

> "A statement made by a person subjected to psychiatric examination or treatment pursuant to . . . (various statutory procedures) for all the purposes of such examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communication, (unless such statement constitutes an admission of guilty of the crime charged)." (See 18 U.S.C. § 4244 (1970))

Some authors have suggested a bifurcated, two-part trial, one to determine whether the defendant has committed the alleged act, which would exclude psychiatric testimony, and a second to determine his mental competency. For the reason that we believe it to be a violation of Due Process to compel an accused to prove his sanity by a preponderance of the evidence—thus relieving the State of the burden of proving the essential ingredients of the crime including *mens rea* (See question III *infra*) —we do not believe this suggestion is either constitutional or practical.

Some courts have simply held that the State has no constitutional power whatsoever to compel a defendant to undergo a pretrial psychiatric examination or to penalize him for refusing. *Shepard v. Bowe*, 250 Ore. 288, 442 P.2d 238 (1968); *French v. District Court, Division 9*, 153 Colo. 10, 384, P.2d 268 (1963); *State v. Olson*, 274 Minn. 225, 143 N.W.2d 69 (1966).

Irrespective of whether petitioner could or could not be compelled to undergo a State conducted pre-trial psychiatric examination, the prosecuting attorney should not have been permitted to admit into evidence petitioner's refusal to cooperate or comment upon such refusal in his final argument. Certainly such comment violates the rule of the court as announced in *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964) and *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229, reh. den. 381 U.S. 957, 15 L. Ed. 2d 730, 85 S. Ct. 1797 (1965) (Ohio has a constitutional provision similar to California's, permitting comment by the prosecuting attorney when the defendant refuses to take the stand in his defense). We can see no difference between commenting upon an accused's failure to testify in his own defense and commenting upon his failure to submit himself to a pre-trial psychiatric examination in which he would necessarily disclose the circumstances surrounding the commission of the alleged crime.

It has been held in many cases to constitute a denial of Due Process to deny to an accused the defense of insanity. The defense of insanity was part of the common law. In 1 M. HALE, PLEAS OF THE CROWN, 14-15 (1678), it is stated:

> "(W)here there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for

> the punishment of crimes or offenses. And . . . where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions."

Holdsworth says that in the reign of Edward III it was settled that "madness, if it existed when the crime was committed, was a defense." 3 W. S. HOLDSWORTH, A HISTORY of English Law, 372 (3d Ed. 1923).

Efforts to eliminate insanity as a defense as a violation of Due Process have been ruled unconstitutional. See *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931). If Due Process guarantees a defendant an insanity defense, then his defense should not be conditioned upon a waiver of the privilege against self-incrimination. Therefore, the prosecution should not require the defendant to cooperate with or submit to an examination to obtain possibly incriminating evidence. See *Garrity v. New Jersey*, 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1967); *Spevack v. Klein*, 385 U.S. 511, 17 L. Ed. 2d 574, 87 S. Ct. 625 (1967). An accused should not be forced by the State to waive either his privilege against self-incrimination or his right to rely on an insanity defense.

The order compelling petitioner to submit to a pretrial psychiatric examination as to his state of mind at the time he killed his wife was extremely prejudicial. In effect, petitioner was penalized by the triers of the fact for not cooperating with the state psychiatrists. Three psychiatrists called by petitioner in his defense all testified that he was insane, i.e. psychotic, at the time he killed his wife and attempted to kill himself. Four of the six court appointed psychiatrists testified that because of petitioner's refusal to cooperate with them they had no opinion. By disregarding the unanimous medical opinion of all the psychiatrists who testified and who had an opin-

ion the trial court was penalizing petitioner for his refusal to cooperate on advice of his counsel with the state psychiatrists and thus afford the state the opportunity to "prove" him sane. What the trial court ignored, or did not say, was that petitioner had a constitutional right *not* to cooperate with the state psychiatrists, at least without some protective order permitting the use of the fruits of such interrogation to rebuttal only.

Many law review articles have been written concerning this constitutional question:

Pre-trial Psychiatric Examinations—State v. Olson, 143 N.W.2d 69 (Minn. 1966), 28 OHIO STATE L. J. 543, Summer 1967;

Kellner, *Pre-trial Psychiatric Examinations and the Privilege Against Self-incrimination*, 1971 U. ILL. L. F. 232-56 (No. 2);

Pre-trial Psychiatric Examinations: A Conflict with the Privilege Against Self-incrimination?, 20 SYRACUSE L. R. 738;

Marcus, *Pre-trial Psychiatric Examinations: A Conflict with the Privilege Against Self-incrimination*, 5 CRIM. L. BULL. 507 (1969);

Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-incrimination, 83 HARV. L. REV. 648 (1970);

Danforth, *Death Knell for the Pre-trial Mental Examination? Previlege Against Self-incrimination*, 19 RUTGERS L. REV. 489 (1965);

Comment, *Compulsory Mental Examinations and the Privilege Against Self-incrimination*, 1964 WIS. L. REV. 671.

There is also an annotation in 32 A.L.R.2d 434 (1953) dealing with this question: "Validity and construction

of statutes providing for psychiatric examinations of accused to determine mental condition."

III. It is a violation of the Due Process to place upon the defendant the burden of proving the defense of insanity by a preponderance of the evidence when evidence of insanity has been introduced by the defendant and a doubt as to sanity created? Should not the rule, under Due Process, be that when intent is required as an element of a crime, the State must prove beyond a reasonable doubt the mental competency of the defendant to commit the crime for which he is charged?

Since *Davis v. United States,* 160 U.S. 499, 40 L. Ed. 499, 16 S. Ct. 353 (1895), it has been the rule in the federal courts that the burden of proving all of the elements of the crime, including criminal intent, i.e. sanity, is upon the State. In *Leland v. Oregon,* 343 U.S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002 (1952), the Court held that Due Process was not violated by an Oregon statute which placed upon the defendant the burden of proving insanity beyond a reasonable doubt; however, in *Re Winship,* 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), with reference to a juvenile proceeding and in a case not involving the defense of insanity, the Court held that Due Process protected an accused against conviction except by proof beyond a reasonable doubt.

In the instant case, three psychiatrists called by petitioner testified that he was insane at the time he killed his wife and attempted to kill himself. Four psychiatrists called by the State testified that they had no opinion. Under this state of the evidence should there not have been thus created in the minds of the triers of the fact a reasonable doubt as to petitioner's sanity?

Petitioner's conviction could result only by reason of placing upon the defendant the burden of proving his sanity, that is, of overcoming the presumption of sanity. The court must have totally disbelieved all of the psychiatric opinion: the opinion of those who had no opinion and the opinion of those who had an opinion. The petitioner was convicted by a presumption.

A presumption cannot deprive an accused of a constitutional right. As was stated by Justice Harlan in *Davis v. United States, supra,* at 160 U.S. 486-488:

> ". . . It is therefore a presumption that is liable to be overcome or to be so far impaired in a particular case that it cannot be safely or properly made the basis of action in that case, especially if the inquiry involves human life. In a certain sense it may be true that where the defense is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged.
>
> * * * * *
>
> Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the be-

ginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not include beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. His guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How, then, upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?"

The Ohio rule which places upon the defendant the burden of proving insanity by a preponderance of the evidence is a violation of Due Process as enunciated by the

Court in *Re Winship*, wherein Judge Brennan said, at 397 U.S. 363-364:

> ". . . Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall*, supra, at 525-526, 2 L Ed 2d at 1472, 1473: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue."

Respectfully submitted,

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APPENDIX

OPINION OF OHIO COURT OF APPEALS

(Decided February 7, 1973)

Case No. 7021

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT, SUMMIT COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

DONALD ZIMMERMAN,
Defendant-Appellant.

OPINION

COOK, *J.*

This appeal is on questions of law from a judgment of the Common Pleas Court.

The facts are not is dispute. On January 5, 1972, the appellant, his wife, Flora, and their three children had an uneventful evening at their home. By approximately 11:00 p.m. all three children had retired for the night. Just prior to going to bed, Lucille, the oldest child, went into her parents' bedroom where she saw her father lying on the bed fully clothed and her mother was under the covers clothed in her pajamas. There was no evidence of any problem. At 3:50 a.m., Lucille and Ann, her younger sister, heard moans coming from their parents' bedroom, investigated and found their mother lying

on the bed in a pool of blood and their father lying on the floor with a knife between his stomach and chest and moaning. The girls called an ambulance and the police.

The children heard their father say "Flora, don't do that. I love you." and "LSD, LSD, Donnie's dead, Donnie's dead". A police officer asked the appellant what had happened and he replied that he had stabbed himself, that his son had died of LSD, he couldn't stand it and he wanted to die, and he and his wife were distressed over the death of their son from an overdose of LSD and they just couldn't stand it any longer.

The appellant survived, was indicted for first degree murder, plead not guilty and not guilty by reason of insanity, was tried by a three judge panel and was convicted of murder in the first degree. A motion for a new trial was overruled and appellant filed his notice of appeal to this court.

The appellant has filed nine assignments of error: first, the trial court erred in appointing six psychiatrists to examine into the mental condition of the defendant-appellant; second, the trial court erred in failing to conduct a hearing prior to trial on appellant's motion to suppress evidence; third, the confession elicited by a police officer from appellant while he was in a semi-conscious state in the emergency room at the hospital is involuntary and should not have been admitted into evidence; fourth, appellant's conviction, in view of his plea of not guilty by reason of insanity, was against the weight of the evidence; fifth, the trial court erred in not requiring the State to prove the sanity of the defendant-appellant beyond a reasonable doubt; sixth, the trial court erred in finding the defendant-appellant guilty of murder in the first degree, there being no evidence of premeditation and deliberation; seventh, the trial court erred in permitting the prosecuting

attorney to waive the commencement of his final argument; eighth, a new trial should have been granted by reason of the misconduct of the prosecuting attorney in his closing argument; and ninth, the trial court erred in recessing the trial from Wednesday noon June 14, 1972, until the following Monday morning, June 19, 1972.

As to assignments of error one, two, eight and nine, no objections by counsel for the defendant-appellant appear in the record.

It is a well established general rule that a reviewing court will consider only such errors in the lower court as were preserved by objection, ruling, or otherwise, in that court. (*Rucker v. State,* 119 OS 189; *Sabo v. State,* 119 OS 231; *Stephenson v. State,* 119 OS 349; *State v. Childs* 14 OS 2d 56)

As to assignment of error one, it is true counsel for the appellant objected to the appointment of Drs. Kern, Jackson, and Friedman by Judge Mahoney, but offered no objection as each of them was called by the State to testify in Rebuttal at the actual trial. We believe the appellant has waived error in their appointment.

However, we are of the further opinion that RC 2945.40 permits the trial court to "appoint one or more, but not more than three, disinterested qualified physicians, specialists in mental diseases, to investigate and examine into the mental condition of the defendant" when his present insanity is under investigation or when insanity is set up as a defense.

In this case, both the present insanity of the appellant and his sanity at the time of commission of the crime were questioned. Since RC 2945.40 permits the court to appoint three psychiatrists in either instance, we are of the opinion the same section permits the appointment of three psychiatrists in both instances.

So, as to assignment of error number one, we find it is without merit.

As to assignment of error number three, we are of the opinion it is without merit.

The United States Supreme Court in *Escobedo v. Illinois*, 378 US 478, held that when a police investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the defendant must be advised of his constitutional rights to consult with an attorney and of his absolute constitutional right to remain silent.

Here, Detective Joseph Wolfe was dispatched to St. Thomas Hospital to investigate the situation discovered at the Zimmerman home. At the time he went to St. Thomas, Detective Wolfe knew only that one victim was DOA at the residence and the other, a male, was at the hospital and he had a large knife protruding from his midsection.

The evidence adduced at the hearing on the motion to suppress clearly indicates the activities of Detective Wolfe in the emergency room of St. Thomas Hospital were investigatory in nature and not accusatory.

All of the questions asked by Detective Wolfe of the appellant concerned an effort to find out what happened. The officer asked no questions about appellant's wife.

The motion to suppress was properly overruled.

As to assignment of error number four, we believe it is without merit.

In Ohio, it is a question for the jury, as the trier of facts, to say whether a witness is to be believed, since it sees the manner in which the witness gave his testimony (*Whitcomb v. State*, 14 O 282; *Kornreich v. Industrial*

F. Ins. Co., 132 OS 78; *Re Silverman*, 163 OS 35). That is, it is the judge of the belief to be attached to a witness' testimony (*Curtiss v. State*, 113 OS 187). The veracity of the witness is for its consideration (*Shriedley v. State*, 23 OS 130), and it is a generally established rule that the credibility of witnesses (*Atkins v. State*, 115 OS 542; *Painesville Utopia Theatre Co. v. Lautermilch*, 115 OS 167; *Tanzi v. New York Cent. R. Co.*, 155 OS 149), or the extent of the credit due them, is a question for the competent facts and circumstances of the case before it. (*State v. Tuttle*, 67 OS 440)

Where there is no jury trial, the trial court is the sole judge of the credibility of the witnesses. Conflicts in the evidence and the weight of the evidence are to be determined by the court alone. (*Re Silverman*, 163 OS 35)

These rules are true not only as to the evidence of witnesses who testify to facts within their own knowledge but also as to opinion evidence of expert witnesses (*Ross v. Stewart*, 15 O App 339; *Lovich v. Salvation Army*, 81 O App 317).

Clearly the trier of the facts is not ordinarily required to find in accord with evidence offered in the form of expert testimony (*Hossler v. Trump*, 62 OS 139).

Here, the defendant-appellant offered the testimony of three psychiatrists that he was insane at the time of the commission of the crime. The State, in rebuttal, offered four psychiatrists attacking the credibility of the three defense psychiatrists. In short, the State's witnesses testified the appellant's witnesses didn't have sufficient information about the appellant to conclude he was insane at the time of the commission of the crime.

The three judge panel was the sole judge as to the credibility of the psychiatrists offered by the defendant-

appellant and on the conclusions to which they testified. Obviously, they found little credibility among them.

As to assignment of error number five, we are of the opinion it is without merit.

The burden is upon the defendant to prove his insanity by a preponderance of the evidence. (*State v. Staten*, 18 OS 2d 13)

The three judge panel found he didn't do so. They attached no credibility to his three psychiatrists. The State acquired no responsibility to prove the appellant sane, it is not an element of the crime.

As to assignment of error number six, we are of the opinion it is without merit. Having failed to prove the defense of not guilty by reason of insanity by the required preponderance of evidence, there was ample evidence of premeditation in the record.

As to assignment of error number seven, we are of the opinion it is without merit. The purpose of final argument is to present your views to the triers of the facts as to what the evidence has shown. The appellant can not be said to be prejudiced by the waiver of opening final argument by the prosecuting attorney.

For these reasons, we conclude there has been no prejudicial error committed in this case.

Judgment affirmed.

/s/ ROBERT E. COOK
Judge Robert E. Cook

JONES, J.
HOFSTETTER, J., concur

Eleventh District judges sitting by assignment on the Ninth District Court of Appeals

ORDERS OF THE SUPREME COURT OF OHIO

(Entered May 25, 1973)

No. 73-303

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellee,

vs.

DONALD ZIMMERMAN,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR SUMMIT COUNTY

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

MOTION FOR LEAVE TO APPEAL FROM THE COURT
OF APPEALS FOR SUMMIT COUNTY

It is ordered by the Court that this motion is overruled.